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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 983

JOHN M. WHELAN & SONS, INC. (CLAIMANT),
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

GEORGE E. BEECHWOOD,
ROBERT G. KELLY,
CONLEN, LABRUM & BEECHWOOD,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of John M. Whelan & Sons, Inc., respectfully represents:

This is a petition for writ of certiorari to the Court of Claims of the United States of America to review the judgment of that court entered on the 5th day of October, 1942 (R. 91), and the subsequent order entered on February 1, 1943 (R. 92).

Question Involved.

Where the contractor is declared in default and its right to proceed with the work is terminated, is the Federal government entitled to recover, in addition to the excess cost

of completing the work, liquidated damages for delay and rental values of officers' quarters, measured by proportionate salaries and rental allowances normally allowed officers as compensation, under Standard Damage Clause of Federal government contract, which provides:

> (1) The government may terminate the contractor's right to proceed, take over the work, and prosecute the same to completion by contract or otherwise, and hold the contractor and its sureties liable for any excess cost occasioned the government thereby,

but

> (2) If the government does not terminate the contractor's right to proceed, and the contractor shall continue the work, it and its sureties shall be liable for liquidated damages for each day beyond the time specified in the contract required to complete the work?

Answered by the United States Court of Claims in the affirmative.

Jurisdiction.

This Court has jurisdiction to consider and grant this petition pursuant to Chapter 229, Section 3, of the Act of February 13, 1925, 43 Stat. 939, Judicial Code (28 U. S. C. A., § 288 (b)).

Statement of the Case.

On or about December 4, 1933, the petitioner, through its authorized agent, and the United States government, through its duly authorized agent, the War Department, entered into a written contract wherein petitioner agreed to furnish labor and material and to perform all work required in the erection of seven officers' quarters at Fort Monmouth, New Jersey, the work to be commenced on December 28th, and completed on or before August 5, 1934.

By extensions duly made by the Federal government the time within which to complete the work by the petitioner was extended until November 30, 1934.

On December 10, 1934, the contracting officer, pursuant to authority of Article 9 of the contract (Exhibit "A", R. 25), wrote the petitioner terminating its right to proceed with completion of the work as of December 4, 1934. This letter was written during a controversy between the parties respecting the interpretation and application of certain provisions of the contract (Findings 3, 4, 5 and 6; R. 58-64, inclusive).

On April 12, 1935 the Federal government relet a contract for completion of the work, in accordance with Article 9 of the contract entered into between petitioner and the government (Finding 6; R. 64).

Under the contract which the Federal government relet there was an excess cost in completing the work of $8,860.93 (Finding 8; R. 66).

The last building was completed and accepted on September 12, 1935 (Finding 6; R. 64).

Your petitioner, for the reasons set forth in the petition filed with the Court of Claims, asked for a recovery against the United States in the total sum of $38,045.70 (R. 1-52, inc.). A general traverse was filed by the United States (R. 52), and it also filed a counter-claim for the sum of $21,747.84 (R. 52-54). The case came on for hearing and the Court of Claims dismissed the petition of the claimant and entered judgment for the United States in the sum of $22,525.56, based on the conclusion of law that the government was entitled, under its contract, to recover not only excess cost of completion, but liquidated damages in the amount of $100.00 for four days' delay, and, in addition thereto, for various items which the government might have saved in allowing officers in their compensation the rental

values of the quarters and proportional cost of the salaries totalling $13,501.00 (R. 65-66).

Reasons for Granting Petition.

(1) The Court of Claims erred in ignoring the plain wording of Article 9 of the contract in question.

(2) The Court of Claims erred in failing to follow its own decisions and those of other courts in interpreting and applying similar provisions of contracts, which interpretation and application public contractors had a right to and did rely upon.

(3) This matter is of vast public importance because most all of the present contracts pertaining to the production of war material contain this identical provision.

(4) It is of paramount public importance that long established decisions interpreting and applying the meaning of provisions of Federal government contracts be not disturbed, and that there remain a uniformity of such interpretation and application of such provisions among all citizens of the United States.

(5) The Court of Claims erred in its decision.

Prayer for Writ of Certiorari.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Claims of the United States commanding said court to certify and send to this Court on a day certain, to be thereafter designated, a full and complete transcript of the record of the proceedings in said Court entitled "*John M. Whelan & Sons, Inc., Claimant* v. *The United States of America,* number 44022," to the end that the said case may be reviewed and determined by this Court; that petitioner may have such relief as this

Court may deem proper, and that the judgment and order of the said Court of Claims of the United States may be reversed by this Honorable Court.

JOHN M. WHELAN & SONS, INC.,
By GEORGE E. BEECHWOOD,
ROBERT G. KELLY,
Attorneys for Petitioner.

Certification.

I hereby certify that I am a member of the Bar of the Supreme Court of the United States; that I am counsel for John M. Whelan & Sons, Inc., the petitioner; that the foregoing petition has been prepared in accordance with the request of the petitioner; that the allegations in said petition are true to the best of my knowledge, information and belief; that said petition is not made for the purpose of delay or prolongation of litigation, and is in my opinion well-founded in law and in fact, and should be granted.

GEORGE E. BEECHWOOD.